

IN THE
Supreme Court of the United States

October Term, 1987

No. 87-1801

ISREAL T. ROBLES,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

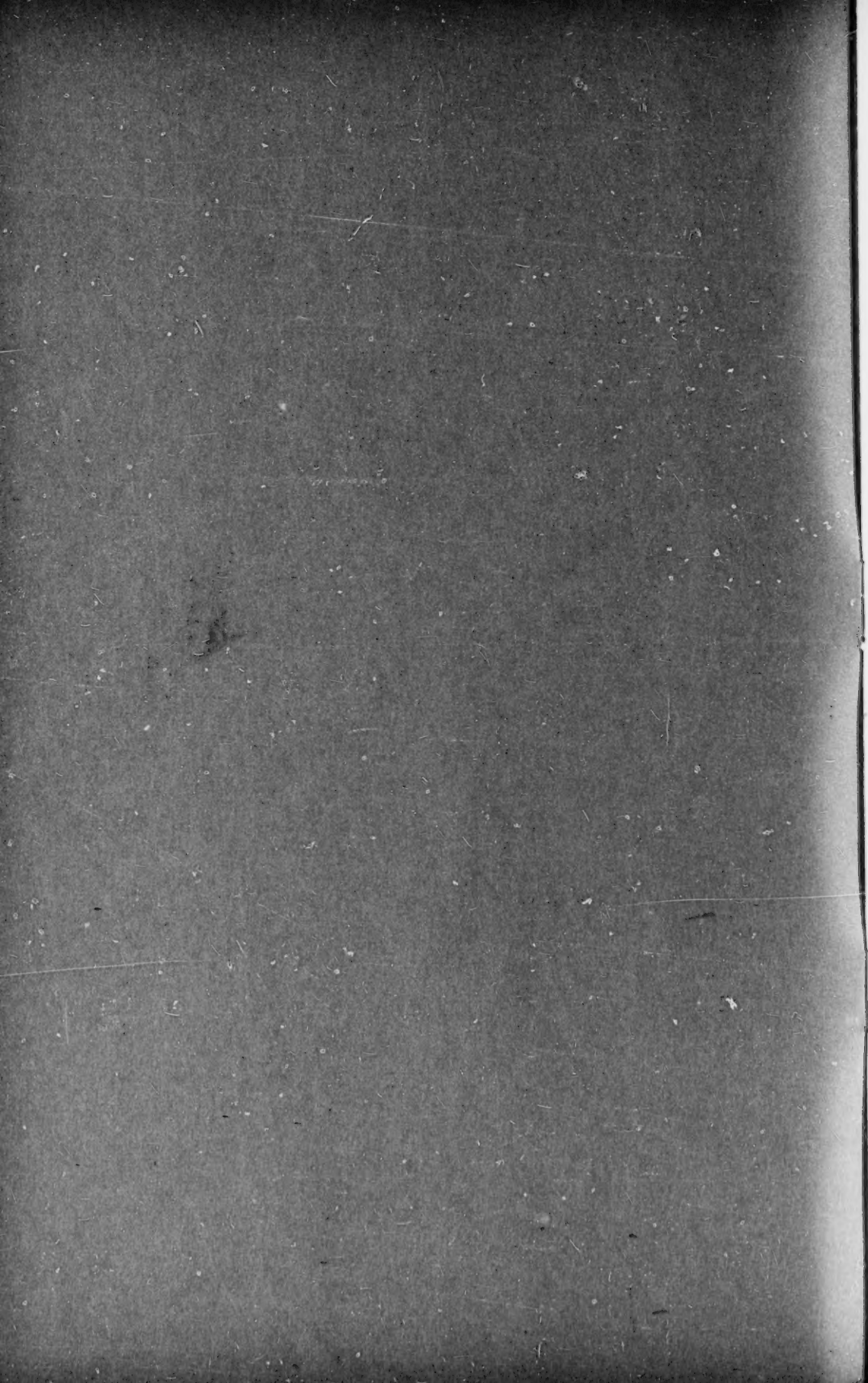
**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

LINLEY E. PEARSON
Attorney General of Indiana

RICHARD G. WEBSTER
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6232

Attorneys for Respondent



QUESTIONS PRESENTED FOR REVIEW

I. Whether the Petitioner had standing to contest the search of the duct tape wrapped bundles under the holding of *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

II. Whether sufficient exigent circumstances existed to support the warrantless search of the duct tape wrapped bundles.

III. Whether the decision of the Indiana Supreme Court establishes an "airport exigency exception" to the requirement that a search warrant be obtained before the police search a package.

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Respondent, State of Indiana, respectfully requests the Court to deny the issuance of a Writ of Certiorari directed to the Supreme Court of Indiana and, thereby, refuse to review the decision entered by that court under cause number 285 S 42 on July 28, 1987.

OPINION BELOW

The decision of the Supreme Court of Indiana is published at 510 N.E.2d 660 (1987) and is set out in the Petitioner's Appendix A. The Petitioner's Petition for Rehearing was denied without opinion and is set out in the Petitioner's Appendix B.

STATEMENT OF THE CASE

On December 31, 1983 about 3:15 p.m., the Petitioner

approached the Britt Airways ticket counter at the Indianapolis International Airport. He told the attendant that he had a reservation to Chicago. The ticket agent checked her computer and found that Petitioner had a prepaid one-way ticket to Chicago in his own name. When asked for identification, the Petitioner produced a Puerto Rican identification which did not display a photograph. When the agent requested identification displaying a photograph, Petitioner produced another identification without a picture and then produced his Florida driver's license listing a Miami address and having a photograph.

The Petitioner was carrying a small lightweight zipper bag, which although small enough to carry on the airplane, he wanted to check through baggage (which would avoid x-ray scanning of carry-on items). A destination tag was put on the Petitioner's bag and he was given a corresponding claim stub. The Petitioner's bag was sent down to the luggage area and he left the counter.

The Britt agent suspected Petitioner might be carrying narcotics because of (1) his Puerto Rican and Florida identification; (2) his checking of the lightweight luggage, and (3) the fact that he had a prepaid one-way ticket to a city so far from his home yet carried only a small bag. The agent reported her suspicions to other Britt employees. The Petitioner's bag was retrieved and brought to the Britt operations office. Britt Operations Manager Kevin Macy opened the Petitioner's bag and discovered two packages wrapped in duct tape. One package was about the size of a baseball and the other was as large as a football. Macy had never seen packages like this and could not ascertain their contents. He called the airport police with a report of "suspicious packages."

Officer Gerald Clinger arrived at the Britt office about 3:40 p.m. Macy showed him the open suitcase with the two taped packages sitting on top of some clothing. Macy said he did not know what they had but the ticket agent was suspicious of the man that checked the bag. Officer Clinger picked up the packages and examined them. He believed a felony might be in

progress because he had seen pictures of such packages in law enforcement magazines and learned at the police academy that narcotics were commonly transported in that type of bundle. In response to Officer Clinger's questions, the Britt employees said that they did not know where the Petitioner had gone after he had left the ticket counter, but his flight was to depart at 4:00 p.m., twenty (20) minutes away.

Officer Clinger peeled the tape off the smaller bundle and discovered aluminum foil stuck to the tape. Clinger saw a plastic bag with a white powdery substance under the foil. He conducted a narcotics field test on the white powder and obtained a positive reaction for cocaine. Officer Clinger summoned two other officers. The taped package was rewrapped and returned to the bag. The officers obtained a description of the Petitioner, took the bag, and located Robles at the Britt departure gate. The Petitioner agreed to accompany the police to answer questions concerning the bag.

The Petitioner was read his *Miranda* warnings and he acknowledged them. When asked, he twice denied that the bag was his. Officer Clinger asked to see the Petitioner's ticket, which matched the tag on the bag. Petitioner then admitted that he had been carrying the bag but denied that it belonged to him. Petitioner stated that the bag belonged to a friend named "Juan" (whose last name Petitioner did not know), who had asked the Petitioner to carry the bag to Chicago. Petitioner was subsequently arrested. Prior to trial, the Petitioner moved to suppress the evidence obtained as a result of the search of the bag and the taped bundles. After a hearing, at which evidence was presented, the trial court overruled the Motion to Suppress.

SUMMARY OF THE ARGUMENT

I. The Petitioner had no standing to contest the search of the taped bundles under the holding of *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). Although Petitioner may have had possession of the bag in which the bundles were found, he denied any ownership of the

bag and its contents. Therefore, under *Salvucci* he had no standing to contest the search of the taped bundles.

II. Sufficient exigent circumstances existed to support the warrantless search of the taped bundles. Officer Clinger had very little time in which to prevent the removal of the evidence and the departure of the Petitioner. Under the facts as presented to him, probable cause was present. Additionally, exigent circumstances permitted the search of the bundles without a search warrant.

III. The decision of the Indiana Supreme Court did not establish an "airport exigency exception" to the requirement that a search warrant be obtained before the police search a package found in a suitcase at an airport. The decision merely recognizes the exigent circumstances that were present in this particular case. Exigent circumstances are determined on a case by case basis; therefore, the decision does not establish an airport exigency exception.

ARGUMENT

I.

THE PETITIONER HAD NO STANDING TO CONTEST THE SEARCH OF THE TAPED BUNDLES UNDER THE HOLDING OF UNITED STATES V. SALVUCCI

It is the Respondent's position that the Petitioner had no standing to contest the search of the taped bundles by Officer Clinger. The Petitioner previously argued that there was no question that he had standing to challenge the search because the facts presented clearly showed his possessory interest in the bag and its contents. Under the holding of *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), a possessory interest was all that was required to have standing to challenge a search if a defendant was charged with a crime of possession. *Jones* focused on whether the person seeking to challenge a search was a "victim" of the search or seizure. *Jones* established an "automatic standing" rule which allowed a challenge to an allegedly illegal search by one charged with a crime

in which the possession necessary to establish standing was also an essential element of the crime. The Petitioner in this present cause was charged pursuant to Indiana Code § 35-48-4-1 with Dealing in Cocaine. An essential element of this crime is that a defendant must possess cocaine with the intent to deliver it. *Jones* would, therefore, seem to endow the Petitioner with automatic standing to challenge the search and seizure of the taped bundles. However, the automatic standing rule established by *Jones* was overruled by this Court in *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). The Court held that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. Therefore, mere possession no longer confers automatic standing. 448 U.S. at 85; 100 S.Ct. at 2549. The Supreme Court went on to say that the automatic standing rule had created too broad a gauge for the measurement of Fourth Amendment rights. Rather it must be asked not merely whether a defendant had a possessory interest in the item seized, but also whether he had an expectation of privacy in the area searched.

After the Petitioner was located at the Britt departure gate he agreed to answer some questions. He was read the *Miranda* advisories and acknowledged them. Upon being asked, he *twice* denied that the zipper bag was his bag. When it was pointed out that the numbers on his ticket and on the tag placed on the bag at the time it had been checked in matched he did admit that he had been carrying the bag. However, the Petitioner stated that he was carrying the bag for a friend named Juan and that the bag did not belong to the Petitioner. The Petitioner has never, at any time, claimed any ownership of the bag or its contents. Therefore, the Respondent submits that the Petitioner never asserted that his Fourth Amendment rights had been violated by the search of the taped bundles since he had disclaimed ownership of the bag and its contents. A person has no Fourth Amendment right to challenge the search or seizure of another person's property. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980);

Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), *rehearing denied*, 439 U.S. 1122, 99 S.Ct. 1035; *United States v. Tolbert*, 692 F.2d 1041 (6th Cir., 1982). Therefore, the Petitioner had no standing to object to the search of the zipper bag and the taped bundles which he maintained were not his, but belonged to a friend named "Juan."

II.

SUFFICIENT EXIGENT CIRCUMSTANCES EXISTED TO SUPPORT THE WARRANTLESS SEARCH OF THE TAPED BUNDLES

The Petitioner argues that the airport security police should have first obtained a warrant before opening the bundles wrapped in duct tape. Since they failed to obtain a warrant, the Petitioner asserts that the search of the bundles was illegal and his Motion to Suppress should have been granted. It is clearly the law that the police may not conduct a search unless probable cause is established and a warrant is obtained. However, an exception to the warrant requirement exists if there are sufficient exigent circumstances which make a search imperative. *U.S. v. Karo*, 104 S.Ct. 3296, 82 L.Ed.2d 530 *rehearing denied* 105 S.Ct. 51, 82 L.Ed.2d 942 (1984); *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768, *rehearing denied* 453 U.S. 950, 102 S.Ct. 26, 69 L.Ed.2d 1036.

In the present case, the employees of Britt Airlines became suspicious of the Petitioner. His bag was retrieved from the luggage area, brought to the office and opened. Two taped bundles were discovered in the bag. At this point, the airport security police were called and Officer Clinger responded. He reached the airline office about 3:40 p.m., and upon entering was shown the two taped bundles. Officer Clinger observed the bundles and knew from his past training that this type of bundle was invariably used in the transportation of narcotics. The Officer asked where the owner of the bag was and was informed that no one knew where he had gone. He was also informed that the flight on which this bag was to be put was scheduled to leave at 4:00 p.m., twenty (20) minutes from then.

The day on which this event occurred was Saturday, December 31, 1983, New Year's Eve. At this point, Officer Clinger peeled the tape off one of the taped bundles and discovered a plastic bag of white powder. The white powder was subjected to a field test and the test was positive for cocaine:

It is clear that sufficient exigent circumstances were present to support the warrantless search of the taped bundles. The Officer was aware drugs were usually contained in such bundles, the Petitioner's whereabouts were not known and the flight on which the Petitioner and his bag were to depart was due to leave in about twenty (20) minutes. It was late on a Saturday and it was New Year's Eve. Therefore, it would have been difficult if not impossible to obtain a warrant. It is apparent that action had to be taken quickly and Officer Clinger determined to open the bundles. Under these and similar facts, exigent circumstances have been found to be present and to excuse warrantless searches. *United States v. De La Fuente*, 548 F.2d 528 (5th Cir., 1977); *United States v. Ford*, 525 F.2d 1308; *United States v. Hand*, 516 F.2d 472 (5th Cir., 1975); *United States v. Ogden*, 485 F.2d 536 (9th Cir., 1973); *United States v. Berger*, 355 F.Supp. 919 (W.D. N.Y., 1973). Any delay in the departure of the bag may well have alerted the Petitioner that the authorities were on to him. This would have made his arrest more difficult, if not impossible. Even if the Petitioner had been allowed to proceed to Chicago and the police there had been alerted, there is no guarantee that they would have been able to find him or even obtain a warrant in time to search his bag.

The Petitioner also puts forth the option of obtaining a dog trained to sniff out narcotics and allowing the bundles to be sniffed. This procedure has been found not to be a search under the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). However, there was no evidence as to the present availability of such a dog, nor was there evidence that a dog could be obtained within a reasonable amount of time such as to override the exigent circumstances which were present. The exigent circumstances as they were

presented to Officer Clinger were sufficient to support the warrantless search of the taped bundles. In addition, police dogs were unnecessary as Officer Clinger already had established sufficient probable cause.

III.

THE DECISION OF THE INDIANA SUPREME COURT DOES NOT ESTABLISH AN "AIRPORT EXIGENCY EXCEPTION" TO THE REQUIREMENT THAT A SEARCH WARRANT BE OBTAINED BEFORE THE POLICE SEARCH A PACKAGE

The Petitioner argues that the decision of the Indiana Supreme Court, establishes an "airport exigency exception" to the requirement that a search warrant be obtained before the police search a package found in a suitcase at an airport. He contends that such a procedure disregards the holding of *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) and *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). The Petitioner alleges that these cases recognize that when police officers possess specific probable cause that certain closed containers contain contraband those closed containers do not lose their privacy rights simply because they are found under a general exigency to the search warrant requirement. However, a reading of the above-cited cases reveals that all but *Jacobsen* specifically recognize that the existence of exigent circumstances supporting the needs for an immediate search are an exception to the requirement that a search warrant be obtained. *Jacobsen* states that the reasonableness of the police invasion must be determined on the facts as they existed at the time the invasion occurred. This is clearly the basis on which the Indiana Supreme Court decision rests. It examined the facts as they existed at the time Officer Clinger opened the taped bundle and found that exigent circumstances existed, and that, under these facts, such an invasion was reasonable. As a result, the decision of the Indiana Supreme Court prop-

erly held that the narcotics found as a result of this search were admissible into evidence because the warrantless search was, under the circumstances, reasonable.

The Petitioner also makes the bald assertion that the State must make all reasonable efforts to negate any exigent circumstances. However, this directly conflicts with the rule stated in *Jacobsen* that the reasonableness of the police invasion be determined on the facts as they existed at the time the invasion occurred. Furthermore, to require the police to negate all possible exigent circumstances which might be present would impose a burden on the State of such magnitude that the existence of exigent circumstances would never be found sufficient to overcome the requirement of a search warrant.

CONCLUSION

For all the foregoing reasons, the Respondent requests that the Petition for Writ of Certiorari to the Supreme Court of Indiana be denied.

Respectfully submitted,

LINLEY E. PEARSON

Attorney General of Indiana

RICHARD C. WEBSTER

Deputy Attorney General

Office of Attorney General

219 State House

Indianapolis, Indiana 46204

Telephone: (317) 232-6232

Attorneys for Respondent